

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

THE NORTHEAST OHIO COALITION,	.	
FOR THE HOMELESS, et al.,	.	
	.	
PLAINTIFFS,	.	CASE NO. 2:06-CV-896
	.	
VS.	.	COLUMBUS, OHIO
	.	MAY 10, 2012
JON HUSTED, in his official	.	
capacity as Secretary	.	4:00 P.M.
of the State of Ohio,	.	
	.	
DEFENDANT,	.	
	.	
and	.	
	.	
STATE OF OHIO,	.	
	.	
INTERVENOR-DEFENDANT.	.	
. . . . .	.	

***TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE***  
BEFORE THE HONORABLE ALGENON L. MARBLEY  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	CAROLINE GENTRY, ESQ.
	DANIEL B. MILLER, ESQ.
	SUBODH CHANDRA, ESQ.
	STACEY M. LEYTON, ESQ.
	STEPHEN P. BERZON, ESQ.
	MICHAEL J. HUNTER, ESQ.
	CATHRINE J. HARSHMAN, ESQ.
	DONALD J. MCTIGUE, ESQ.
FOR THE RELATORS:	W. STUART DORNETTE, ESQ.
	JOHN B. NALBANDIAN, ESQ.

APPEARANCES CONTINUED:

FOR THE DEFENDANT JON HUSTED:           AARON D. EPSTEIN, ESQ.  
  PAMELA VEST, ESQ.

FOR THE DEFENDANT STATE OF OHIO:   PEGGY W. CORN, ESQ.  
  DAVID LEIBERMAN, ESQ.

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1 THURSDAY AFTERNOON SESSION

2 MAY 10, 2012

3 - - -

4 THE COURT: Good afternoon. Would counsel please  
5 identify themselves for the record beginning with counsel  
6 for the plaintiffs.

7 MS. GENTRY: Caroline Gentry for plaintiffs NEOCH  
8 and SEIU.

9 MR. MILLER: Dan Miller for plaintiffs NEOCH and  
10 SEIU.

11 MS. LEYTON: Stacey Leyton with Steve Berzon for  
12 plaintiffs SEIU.

13 MR. HUNTER: And Mike Hunter with Cathrine Harshman  
14 for plaintiffs SEIU.

15 MR. CHANDRA: Subodh Chandra for plaintiffs NEOCH  
16 and SEIU, along, with the Court's permission, Ashley  
17 Sletvold, S-L-E-T-V-O-L-D, who will be applying shortly to  
18 the Seventh Circuit.

19 MR. MCTIGUE: Donald McTigue on behalf of plaintiff  
20 Ohio Democratic Party.

21 THE COURT: And counsel for the relators.

22 MR. DORNETTE: Stuart Dornette and John Nalbandian  
23 for Mr. Neihaus and Mr. Blessing.

24 MR. EPSTEIN: Aaron Epstein with Pamela Vest for  
25 Ohio Secretary of State Husted.

1 MS. CORN: Peggy Corn and David Leiberman for  
2 defendant State of Ohio.

3 THE COURT: What I'm going to do now -- and I  
4 appreciate everyone's patience -- is announce my decision.  
5 As you can appreciate, I received probably about thirty  
6 minutes ago a reply memorandum, and I received at noon  
7 today the relators' memoranda. I have a draft opinion.  
8 Given the importance of this case, I have a draft opinion  
9 that is going to have to be massaged to be put in final  
10 form, but I have the structure of my opinion set forth in  
11 this draft, and so I'm going to give you my answer. I'm  
12 going to read some of it. So, when you get the written  
13 opinion tomorrow, you'll recall some of the things I said,  
14 and it will be enhanced somewhat.

15 But this matter, of course, is before the Court on  
16 what is styled an urgent motion to enjoin state court  
17 proceedings and for an order to show cause why relators  
18 Thomas Neihaus and Louis Blessing Jr. should not be held in  
19 contempt. The Court treated this yesterday as -- our  
20 conference yesterday as a 65.1 conference under the local  
21 rules, as the plaintiffs are seeking an injunction. In  
22 fact, the plaintiffs' motion seeks immediate injunctive  
23 relief in the form of an order from this Court enjoining  
24 Mr. Neihaus and Mr. Blessing and their counsel from further  
25 prosecuting the state court proceedings in State ex rel

1        Neihaus versus Husted, the mandamus action.

2                The relators in this case contend that the  
3        plaintiffs' request for injunctive relief should be  
4        rejected for three reasons, essentially, that the relators  
5        are not a party to the lawsuit and, therefore, this Court  
6        lacks jurisdiction to enjoin them from pursuing their state  
7        law claims; second, that there is and has been no violation  
8        of this Court's order as to make the plaintiffs' claim  
9        ripe; and, three, principles of federalism provide that the  
10       Ohio Supreme Court is the final authority on issues of  
11       state law.

12              The first issue that I must address is whether I  
13       have jurisdiction, and here that means determining whether  
14       I have the authority to enjoin the relators from  
15       prosecuting their currently pending mandamus action.

16              Second, the ripeness issue is addressed -- I will  
17       address that; and finally, whether the relief requested by  
18       the plaintiffs is appropriate or warranted.

19              On the record before the Court, I don't see that the  
20       jurisdiction and the authority of this Court over the  
21       relators can be reasonably questioned. The relators are  
22       acting as officials and agents of the State of Ohio which  
23       is a named party to the consent decree. Additionally, even  
24       if the relators were collaterally attacking the consent  
25       decree's terms -- let me rephrase that. I think the same

1 would be true even if the relators were not treated as  
2 representatives of the State of Ohio and were not -- were  
3 nonparties to this action, I would have authority under the  
4 All Writs Act to enjoin them from, quote, frustration of  
5 the consent. And that's the *City of Detroit* case that I'll  
6 refer to later, which was a 2003 en banc decision from the  
7 Sixth Circuit in which the Sixth Circuit held that the All  
8 Writs Act provides district courts with the authority to  
9 bind nonparties in order to prevent the frustration of  
10 consent decrees that determine the parties' obligations  
11 under the law.

12 In their briefing, the relators do not dispute that  
13 the State of Ohio is a party to this action; however, they  
14 argue that the Ohio General Assembly and its members are  
15 not and never have been parties to the action or to the  
16 consent decree.

17 The mandamus action that Messrs. Neihaus and  
18 Blessing have filed has been brought by the State of Ohio  
19 *ex relatione*, which is the Latin for, quote, on behalf of,  
20 or upon the request of, the relators. The mandamus action  
21 was filed by the attorney general for the State of Ohio,  
22 whose office has represented the State of Ohio in this  
23 action including the consent decree proceedings.

24 The relators are prosecuting the mandamus action in  
25 their official capacities as elected state officials. As

1       such, an order from this Court enjoining the relators is,  
2       as far as the law is concerned, an order enjoining the  
3       State of Ohio, a named party to this action and subject to  
4       the binding terms of the consent decree.

5             The relators argue that they are, quote, no more  
6       agents of the State of Ohio for purposes of this case and  
7       the decree than the governor, the auditor of the state, the  
8       treasurer of the state, or the individual justices of the  
9       Ohio Supreme Court. However, they quixotically cite Ohio  
10      Revised Code 109.36(B) for support in this proposition.  
11      That statute states that, quote, State means State of Ohio,  
12      including but not limited to the general assembly, the  
13      Supreme Court, courts of appeals, the offices of the  
14      elected state officers, and all departments, boards,  
15      offices, commissioners, agencies and other  
16      instrumentalities of the State of Ohio.

17            As there is no dispute that the State of Ohio is a  
18      party to this action, there can, accordingly, be no dispute  
19      that relators, who sue on behalf of the State of Ohio in  
20      their capacities as elected state officers and members of  
21      the general assembly, are bound by the terms of the consent  
22      decree when acting in the capacity in which they brought  
23      suit.

24            Even if the relators were not treated as  
25      representatives of the state, as I said, and were

1 nonparties, the *City of Detroit* case would compel the  
2 conclusion that under the All Writs Act this district court  
3 can enjoin them from frustrating the terms of the consent  
4 decree. What they want to do is invalidate the consent  
5 decree, and so there is no more clear case of frustration  
6 of a consent decree than invalidating it.

7 The U.S. Supreme Court in United States versus New  
8 York Telephone Company 434 U.S. 159, 1977, also affirms  
9 this Court's power to enjoin nonparties under the All Writs  
10 Act. I wanted you to be aware of that bit of authority.

11 The relators state that the State of Ohio was not  
12 represented at the April 19th, 2010, hearing regarding the  
13 consent decree's terms and, thus, the State of Ohio did not  
14 agree to the consent decree. I don't know whether this  
15 argument is disingenuous, or whether it was just made for  
16 expediency. But, as two years have passed since the  
17 decree's issuance and the State of Ohio is clearly, as a  
18 designated party, bound by the terms of the consent decree,  
19 I don't really see how that argument is meritorious.

20 Paragraph 11 of the consent decree provides that at any  
21 time any of the parties may file a motion with the court to  
22 modify, extend, or terminate this decree for good cause  
23 shown. That they now complain of having not been duly  
24 represented in the proceedings is untimely, and, in any  
25 case, is a motion that should be made to this Court and not



1 to the Supreme Court of Ohio. It almost seems that the  
2 relators in this case are doing forum shopping.

3 If you look at Ms. Ashbrook's affidavit, it does  
4 indicate that she was representing the State of Ohio. It  
5 says in paragraph three of her affidavit: Since the  
6 settlement negotiations began in this case, I acted as the  
7 client contact for the State of Ohio, comma, a party in  
8 this case.

9 So, if your lawyer says that she represented you and  
10 you were a party to this case, that is at least some  
11 compelling evidence that the State was a party to the case.

12 I'm going to address just for a moment also the  
13 argument that this case is not ripe. The relators make the  
14 argument that the case is not ripe. The precedent that  
15 will be gleaned from my written order, basically beginning  
16 with the *Lorillard Tobacco Company* case, which was decided  
17 by the Sixth Circuit, an affirmative decision of Judge  
18 Sargus on this court, makes clear that state court actions  
19 can be enjoined from further prosecution before a decision  
20 has been made in that case. Under essentially the All  
21 Writs Act, that's what - *Lorillard* - the Court relied on  
22 when the case was before the Sixth Circuit, and that's what  
23 Judge Sargus relied on when the case was at the trial court  
24 level.

25 The All Writs Act provides that the Supreme Court

1 and all courts established by an act of Congress may issue  
2 all writs necessary or appropriate in aid of their  
3 respective jurisdictions and agreeable to the usages and  
4 principles of law.

5 Now, the relators claim that the Anti-Injunction Act  
6 prohibits the Court from enjoining their action, but, if  
7 you look carefully at the Anti-Injunction Act, the  
8 exceptions would allow this Court to enjoin the relators.

9 The Act provides: A Court of the United States may  
10 not grant an injunction to stay proceedings in a state  
11 court except as expressly authorized by an act of Congress,  
12 or where necessary in aid of its jurisdiction, or to  
13 protect or effectuate its judgment.

14 So all three of these exceptions apply to this case,  
15 but most obviously the second and third apply on their  
16 face.

17 One of the other issues that the relators raise is  
18 with respect to the appropriateness of the plaintiffs'  
19 requested injunction. The relators raise the district  
20 court's - Judge Deloitte - statements and her opinion in  
21 Hunter versus Hamilton County Board of Election where she  
22 held: It is within the province of the Ohio Supreme Court  
23 to determine whether Secretary of State Jennifer Brunner's  
24 directives comply with state law governing election  
25 proceedings, and this Court will not enjoin the Ohio

1 Supreme Court from doing so.

2 My court does not dispute this proposition, nor does  
3 it dispute for a moment the jurisdiction of the Ohio  
4 Supreme Court to decide the laws of Ohio; however, where,  
5 as in this case, the possibility of a contrary order from a  
6 court of coordinate jurisdiction threatens to create an  
7 unseemly conflict, or frustrate the orders of this court,  
8 an injunction would be appropriate.

9 So based on the status of the record and based  
10 principally on the fact that the relators are bound by  
11 the -- as part of the State of Ohio, they're bound by the  
12 consent decree, their proper remedy is to come before this  
13 court and to seek to modify the consent decree based on the  
14 information that you were going to present to the Supreme  
15 Court, Mr. Dornette.

16 In other words, you would come to me essentially  
17 with the same arguments that you would make to the Court,  
18 and I suppose that you would argue that *Painter* has changed  
19 the landscape such that the consent decree needs to be  
20 modified. Who knows, perhaps you will get an agreement  
21 from all of the parties to the consent decree to modify it  
22 in light of *Painter*. But the proper recourse, because  
23 you're parties to the consent decree, is to come before  
24 this Court to seek to modify the terms of the consent  
25 decree.

1           In that spirit, then, the Court is going to enjoin  
2           the relators from prosecuting further their mandamus action  
3           in the Ohio Supreme Court, and I am directing the relators  
4           to dismiss forthwith, without prejudice, their mandamus  
5           action that presently is pending before the Ohio Supreme  
6           Court.

7           Are there any questions from the plaintiffs?

8           MS. GENTRY: No, Your Honor. Thank you.

9           THE COURT: Any questions from counsel for the  
10          relators?

11          MR. DORNETTE: Your Honor, obviously we want to take  
12          a look at the order when you have it. I don't know if you  
13          have thoughts on "forthwith." We obviously have to talk to  
14          our client.

15          THE COURT: Forthwith -- I know how you meant the  
16          question, Mr. Dornette, so I'm just chuckling. But it  
17          means now. And because I'm directing you to dismiss it  
18          without prejudice, once this order is appealed, I'm deemed  
19          to be wrong, you can reinstate your proceeding and there  
20          will not be a significant passage of time in light of the  
21          fact that we're coming up on an election.

22          Now, while I have you, though, I'm assuming that the  
23          parties wish a hearing, which will be in the nature of a PI  
24          hearing because we need to address this as expeditiously as  
25          possible if, for no other reason, so that you,

1 Mr. Dornette, can get this matter before the Sixth Circuit.  
2 I don't know how much discovery you all will need to engage  
3 in, in preparation for a hearing on this.

4 Mr. Dornette, since you are more directly affected  
5 and your clients are more directly affected, how soon can  
6 you be prepared to proceed? How much time are you going to  
7 need because, as I see it, I don't know that you need to --  
8 this is mostly a legal argument. I don't know that there's  
9 a factual record that needs to be developed. But I do  
10 think that you can present to me and before my court the  
11 arguments that you were going to make about the invalidity  
12 of the consent decree in light of *Painter*, maybe you'll  
13 want to do that at this time also.

14 MR. DORNETTE: When you say "also," do you have in  
15 mind also arguing about what we've argued about --

16 THE COURT: Yes, that's right.

17 MR. DORNETTE: I don't know that there is need for  
18 further argument on that, Your Honor.

19 THE COURT: I was going to leave it up to the  
20 parties.

21 MR. BERZON: Stephen Berzon for Local 1199 SEIU for  
22 the plaintiffs. I don't know if the relators will agree,  
23 but it seems to me -- we will have to read the ruling, but  
24 based on Your Honor's ruling, I would think we could treat  
25 the order, insofar as it covers the Ohio State Supreme

1 Court proceedings, as the injunction because it is a legal  
2 ruling, and then we could work out whatever timetable works  
3 for the relators, if they want to proceed on a motion to  
4 modify the consent decree, that works with your schedule  
5 and the relators' schedule.

6 THE COURT: I was thinking that. That might make  
7 the most sense.

8 Mr. Dornette, what do you think?

9 MR. DORNETTE: As I said, Your Honor, I don't see  
10 that there is a lot of benefit to anyone in wasting Your  
11 Honor's time or the parties' time in essentially  
12 re-litigating that which you have already decided.

13 THE COURT: I agree. You know, that's music to a  
14 district judge's ears, Mr. Dornette. I agree with you on  
15 that. If we're all in agreement, that order and opinion  
16 will go out tomorrow, and you can seek whatever relief you  
17 deem appropriate from that order.

18 In the interim, however, we -- I think that we need  
19 to schedule a hearing to determine whether the consent  
20 decree should be modified or amended or otherwise altered  
21 in light of *Painter*, which is basically what you were going  
22 to do before the Ohio Supreme Court.

23 MR. DORNETTE: Yes, Your Honor. And I obviously  
24 need to talk to our clients about that. I think, again,  
25 though, that that is -- and I think you were suggesting

1       that this is really a legal issue more so necessarily than  
2       a factual, intensive issue.

3               THE COURT:   Right.

4               MR. DORNETTE:   So it may make the most sense to just  
5       do a briefing schedule on it and then set a time for  
6       argument.

7               THE COURT:   That's fine.

8               MS. GENTRY:   Your Honor, Caroline Gentry for the  
9       plaintiffs.   I think there is a possibility that the  
10      plaintiffs may also want to move to modify the consent  
11      decree on different grounds, so it may be advantageous to  
12      have the parties file their motions and then determine  
13      whether a hearing is necessary.   I don't want to say at  
14      this moment that a hearing will be necessary, but it's  
15      possible that it will be.

16              THE COURT:   What would make the most sense is for  
17      the parties to get together and determine -- you can  
18      present to the secretary of state and to the relators how  
19      you want the consent -- you, plaintiffs, want the consent  
20      decree modified.   The relators can negotiate with you how  
21      they want the consent decree modified, and if -- the  
22      secretary, as a party to the consent decree, certainly can  
23      weigh in on how he wants the consent decree modified, if at  
24      all.

25              So, in other words, all of the parties to the

1 consent decree, before you start spending more of your  
2 client's money and allocating more of your personal time  
3 and resources, maybe the first thing that you should do  
4 now, given the posture of the case, is to sit in a  
5 conference room and determine whether you can agree on the  
6 modifications of the consent decree. If you can't, that's  
7 fine, then we can just proceed to have a hearing on the  
8 modification of the consent decree, the parties can submit  
9 briefs, and I can conduct oral arguments on it.

10 Given the importance of the questions presented, I  
11 could get a mediator like Professor Foley from Ohio State,  
12 who specializes in election law, to mediate this dispute on  
13 behalf of the Court.

14 Is anybody interested in that? Mr. Dornette?

15 MR. DORNETTE: Your Honor, obviously, we have to  
16 talk to our client about this and the range of  
17 opportunities that they have, including that which you  
18 suggested about going immediately to a hearing or briefing  
19 and argument on the merits of the claim we have raised in  
20 the Ohio Supreme Court. We will take a serious look at  
21 that. And obviously the other question that we've got and  
22 they will have, and we will need to talk over with them, is  
23 do we, in lieu of that, want to immediately take an appeal  
24 from this and -- from this order. So I guess I would like  
25 to get back to you, and we can do it probably tomorrow but



1 I'm not certain about the availability of everybody, so it  
2 may have to be on Wednesday. That's what we would propose.

3 THE COURT: Here is what -- I think this would be  
4 the ideal circumstance. I think that ideally we could all  
5 convene and try to work through the disputes, because if  
6 you can agree to the modifications, then that moots  
7 everything. That moots all of these proceedings. If you  
8 can agree to the modifications that you want and the  
9 modifications that plaintiff wants, and any that the  
10 secretary might also want, then you don't need to appeal  
11 this order and you don't need to go to the Supreme Court,  
12 even if the Sixth Circuit agrees with you, Mr. Dornette.  
13 Everything becomes moot. Don't you agree?

14 MR. DORNETTE: That is obviously one possibility,  
15 but, again, it is not one that I've talked with our clients  
16 about.

17 THE COURT: I understand that you haven't talked to  
18 your clients, but you are experienced and skilled enough  
19 that you're going to provide leadership to the clients and  
20 not vice versa. Just as a practical matter, if your  
21 clients got what they wanted in terms of whatever  
22 modification it was, you would agree with me that you don't  
23 need to pursue this aspect of the litigation any further.  
24 Is that right?

25 MR. DORNETTE: Your Honor, I appreciate that. I

1 will remind you that my clients are elected officials.

2 THE COURT: I understand that. But we don't have  
3 that burden. Our only burden is to decide issues of law.  
4 And I will come back to my question because I want the  
5 record to be clear: If you get the modifications to the  
6 consent decree that you have prosecuted the case in the  
7 Ohio Supreme Court for, then those issues become moot,  
8 don't they?

9 MR. DORNETTE: There is that possibility. I just  
10 don't know that that's what would be at the end of it.

11 THE COURT: Okay. Under normal circumstances,  
12 Mr. Dornette, I would require an answer, but because you  
13 just heard my ruling and you probably haven't had an  
14 opportunity to reflect on all of the implications, I'll be  
15 satisfied with what seems to be a provisional ruling in a  
16 provisional ballot case -- a provisional opinion in a  
17 provisional ballot case.

18 MR. BERZON: This is Mr. Berzon. Just so we're  
19 really clear, while we proceed with the rest of the  
20 discussion on what comes with regard to where we go with  
21 next steps regarding modification of the consent decree,  
22 dismissal without prejudice is required now just so that we  
23 don't have any --

24 THE COURT: That's a part -- Mr. Dornette  
25 understands that. That's a part of my order. What we're

1 talking about now is post-order activity. What I'm telling  
2 you -- I'm trying to get a consensus among the parties that  
3 if you can reach an agreement as to the modifications under  
4 the consent decree -- put another way, if you can reconcile  
5 *Painter* with the consent decree, then the issues that  
6 Mr. Dornette raised in the Supreme Court are moot.

7 Perhaps I have missed something, but it seems to me  
8 that that's what he sought the writ for, at least that's  
9 what I was told during the conference yesterday. That's on  
10 the record.

11 If I misstated your position, Mr. Dornette, please  
12 speak up.

13 MR. DORNETTE: Your Honor, as I said before, it is  
14 possible that in discussions about all of this, that what  
15 our clients are interested in receiving, they could get and  
16 I just need to find out -- I need to read what this is and  
17 get with them on that. So I go back to -- I may be able to  
18 get back to the Court on that tomorrow, but it may not be  
19 until Wednesday.

20 THE COURT: Ms. Gentry, on behalf of the plaintiffs,  
21 do you see any additional issues that are exigent if you  
22 can agree on the modifications that Mr. Dornette has  
23 requested from the Ohio Supreme Court?

24 MS. GENTRY: Your Honor, the only other issue that I  
25 think would be outstanding is the contempt portion of the

1 motion, which is probably partly mooted by the relief that  
2 the Court has already ordered.

3 THE COURT: It is. I'm not going to hold them in  
4 contempt for going to -- at least on the record before me  
5 and under my order, I'm not going to issue a rule to show  
6 cause why the relators should be held in contempt.

7 MR. BERZON: Your Honor, this is Mr. Berzon. We  
8 would agree and point out that civil contempt always goes  
9 forward, so, as long as they dismiss the decree  
10 immediately, as Your Honor -- dismiss the writ of mandamus  
11 immediately without prejudice, as Your Honor has ordered,  
12 the contempt becomes moot.

13 THE COURT: Yes.

14 Is there anything else?

15 MS. GENTRY: No, Your Honor, not from the  
16 plaintiffs.

17 THE COURT: Now, we aren't done yet. I don't want  
18 you to get relaxed and get ready to hang up because we  
19 haven't decided on next steps. I want us to stay on track.  
20 We can schedule another conference call for Wednesday,  
21 after you, Mr. Dornette, have a opportunity to speak with  
22 your clients.

23 MR. DORNETTE: I think that makes sense, Your Honor.

24 THE COURT: But I want counsel for the plaintiffs,  
25 and you, Mr. Dornette, and all counsel to be able to take

1 the following suggestion back, because we can work  
2 collaboratively in this process.

3 What I think that you should all do is before we  
4 proceed with any further court action is I think we should  
5 agree to a mediation, to see if we can reconcile -- see if  
6 there's any need to modify the consent decree. Apparently,  
7 all parties -- well, not all parties, but at least the  
8 plaintiffs and the State of Ohio, both parties to the  
9 consent decree, wish to modify it in some way.

10 So whether you agree with this position,  
11 Mr. Dornette, or you, Ms. Gentry, if the parties can agree  
12 to the modification, the remaining issues are moot. Then  
13 you can modify the -- assuming that the Court goes along  
14 with the modifications, you can modify the consent decree,  
15 and then we can have an election in which votes count,  
16 because I know that the real point of all of this is to  
17 make sure that the franchise is not undermined. At least I  
18 can get agreement to that. Right, Counsel?

19 MR. DORNETTE: Absolutely, Your Honor.

20 MS. GENTRY: Yes, Your Honor.

21 THE COURT: And all counsel also are probably  
22 painfully aware that the courts will protect the franchise.

23 So the first step would be, in my mind, to have a  
24 mediation. Either I can conduct the mediation, or I can  
25 get one of my colleagues on the bench to conduct the

1 mediation, or I can get an outside mediator like Professor  
2 Foley, who is an expert in election law, to conduct the  
3 mediation, or perhaps Dean Rogers, who does mediations and  
4 who is an expert on mediations and was former acting  
5 attorney general. I can get someone of that stature to  
6 conduct the mediation on behalf of the Court for anyone who  
7 would be concerned that the same person who was presiding  
8 over the case is also presiding over the mediation.

9 So there are any number of expert mediators who  
10 would be willing to do it. I could provide a list of names  
11 in the event that -- I don't know Professor Foley's  
12 political affiliation. I don't know Dean Roger's political  
13 affiliation. I just know their expertise and that they are  
14 preeminent in their respective fields, and their fields  
15 touch on these issues. I would be willing to hear  
16 someone's argument if they objected to either of the  
17 mediators, if someone had some jurisprudential concerns or  
18 some concerns that might touch upon the appearance of  
19 impropriety or unfairness.

20 Then, assuming that we can't get the issue resolved  
21 by mediation, then we would hold arguments. We can set a  
22 tentative schedule now so people will know what they have  
23 to look forward to, or we can set a tentative mediation  
24 schedule now. I do think that mediation should be a part  
25 of this calculus before we go forward either appealing this

1 to the Sixth Circuit or having an oral argument in my court  
2 on these matters.

3 Ms. Gentry, your position?

4 MS. GENTRY: Your Honor, I agree that it makes sense  
5 for us to see if we can work something out without the need  
6 to further trouble the Court. I think what we should do  
7 for now is have an opportunity for counsel to speak  
8 together. We may be able to agree on certain things,  
9 including a mediator. It would make sense to have us talk  
10 to each other and get back to the Court with another status  
11 conference.

12 THE COURT: Mr. Dornette?

13 MR. DORNETTE: I obviously cannot guarantee that my  
14 clients would be interested in the mediation or the  
15 discussions, but certainly we'll have a conversation with  
16 them. We'll certainly be happy to participate in what  
17 Ms. Gentry is talking about.

18 THE COURT: Can I ask you something without your  
19 disclosing any client secrets or confidences? Is there any  
20 particular reason that you believe that your clients would  
21 not be interested in trying to negotiate what they wanted  
22 the Supreme Court to give them?

23 MR. DORNETTE: Your Honor, I don't know if they will  
24 or don't know if they won't, but I just want to make sure  
25 that I do not lead the Court on if they were to decide that

1 was not the route they wanted to take.

2 THE COURT: I understand that. I just thought that  
3 maybe there was something of which I was unaware that would  
4 lead your clients to take a rather unusual position that  
5 "we don't want to settle and get what we want." That's  
6 just anathema to me. I've been on the bench at least  
7 fifteen years. You don't know they won't get what they  
8 want, but it almost seems that you're saying that there is  
9 a possibility they may only want to get what they want  
10 through the court; they don't want to get what they want  
11 through negotiations with the other side.

12 Did I misunderstand what you were saying?

13 MR. DORNETTE: I think that you -- I just don't  
14 know, but I think you have described what I said  
15 accurately.

16 THE COURT: Mr. Epstein?

17 MR. EPSTEIN: Yes, Your Honor. I'm sorry, what was  
18 the question?

19 THE COURT: Unfortunately, you aren't in law school,  
20 so you can't take a pass.

21 MR. EPSTEIN: I, at least, appreciate the  
22 opportunity to be on the record.

23 THE COURT: It's bad that you and Ms. Vest and  
24 Ms. Corn and Mr. Leiberman have kind of just not had an  
25 opportunity to have an active role, but my question is: Do



1       you have any objection to the game plan that I set out?

2               MR. EPSTEIN: We don't have any objection, Your  
3       Honor. I do think what Ms. Gentry is suggesting makes some  
4       sense, that at least the parties talk to find out how close  
5       the respective concerns about the consent decree are, or  
6       whether they're pointing in such diametrically opposed  
7       directions that the mediation might be futile. I think it  
8       makes sense to have that conversation first before we  
9       commit to anything else.

10              THE COURT: Ms. Corn?

11              MS. CORN: I agree with what Mr. Epstein said. We  
12       don't object to the game plan, but I think it would be a  
13       good idea for the parties to talk to each other to see how  
14       far apart we are.

15              THE COURT: I agree. Given that, then, why don't we  
16       schedule our next status conference for Wednesday the 16th.

17              MS. GENTRY: Your Honor, this is Ms. Gentry. I am  
18       unavailable from 2:30 to 4 that day, but otherwise  
19       available.

20              THE COURT: Mr. Dornette, would later in the  
21       afternoon be better for you, to give you more time to talk  
22       with your clients?

23              MR. DORNETTE: Your Honor, I think by Wednesday  
24       whatever time works for you and for the others will be  
25       fine.

1 THE COURT: Okay. Ms. Gentry, you said you're  
2 unavailable from 2:30 to 4?

3 MS. GENTRY: Yes, Your Honor.

4 THE COURT: Let's do it at -- when will you be  
5 available after four, Ms. Gentry?

6 MS. GENTRY: Your Honor, I could be available right  
7 at four o'clock.

8 THE COURT: We'll make it a four o'clock status  
9 conference, then.

10 MS. GENTRY: Thank you, Your Honor.

11 MS. CORN: Your Honor, this is Ms. Corn. I take it  
12 we'll be on the phone again.

13 THE COURT: Yes. I don't want all of you to have to  
14 travel here unless we're going to be conducting some  
15 business that we couldn't otherwise conduct telephonically.

16 So, in the meantime, Mr. Dornette, your clients,  
17 pursuant to my order, will dismiss without prejudice the  
18 mandamus action. We will have a status conference next  
19 Wednesday, the 16th, at four o'clock, telephonically, to  
20 discuss next steps. Then, in the interim, the Court will  
21 file its written opinion by close of business tomorrow, and  
22 counsel will talk among themselves to see if it can be  
23 resolved informally. You will understand that my position  
24 is going -- and I want you to know I can be persuaded  
25 otherwise, which is the purpose of the status conference,

1 but just so that you will know as you're advising your  
2 clients, Ms. Gentry, Mr. Dornette, Mr. Epstein and  
3 Ms. Corn, my position is going to be, first, there be a  
4 mediation. Then, if mediation doesn't resolve it, then  
5 we'll continue litigation.

6 MR. DORNETTE: Thank you, Your Honor.

7 THE COURT: So that there's no misunderstanding,  
8 Mr. Dornette, I don't know whether there is still time this  
9 afternoon for you to dismiss the lawsuit without prejudice  
10 because it's five o'clock now. I would imagine that the  
11 Supreme Court's clerk's office is closed.

12 MR. DORNETTE: I believe it is closed, Your Honor,  
13 and the last I knew they did not accept electronic filing.

14 THE COURT: Right. They open tomorrow at 8:30, but  
15 I'm not sure. I want it dismissed without prejudice first  
16 thing tomorrow morning, so by nine.

17 MR. DORNETTE: Thank you, Your Honor.

18 THE COURT: And would you file the dismissal  
19 papers -- would you file with this court, Mr. Dornette,  
20 time stamped copies of the dismissal papers?

21 MR. DORNETTE: We shall, Your Honor.

22 THE COURT: Thank you very much. Are there any  
23 other matters we need to take up from the plaintiffs,  
24 Ms. Gentry?

25 MS. GENTRY: Two quick questions. One is whether

1 the Court will file an order today. I understand the  
2 opinion will be tomorrow, but just an order on the  
3 injunctive relief.

4 And the second question is, if a stipulated  
5 dismissal is required because an answer has been filed,  
6 whether the Court's order also contemplates the Secretary  
7 of State will agree to a stipulated dismissal.

8 MR. EPSTEIN: Your Honor, this is Mr. Epstein. As  
9 to the second question, we will stipulate to the dismissal  
10 without an order from the Court.

11 THE COURT: All right.

12 Anything else, Ms. Gentry?

13 MS. GENTRY: Yes, Your Honor, whether the Court will  
14 file an order today on the injunctive relief issue?

15 THE COURT: Well, the fact that my order is on the  
16 record is sufficient and my -- it will be docketed today.

17 MS. GENTRY: Thank you, Your Honor.

18 THE COURT: So it will be docketed today.

19 MS. GENTRY: Nothing else from the plaintiffs.

20 THE COURT: Any other questions from the relators,  
21 Mr. Dornette?

22 MR. DORNETTE: No, Your Honor. Thank you.

23 THE COURT: Mr. Epstein, anything further from you?

24 MR. EPSTEIN: No, Your Honor.

25 THE COURT: Ms. Corn, from you?

1 MS. CORN: No, Your Honor.

2 THE COURT: Listen, thank you, everyone, for your  
3 patience and helping to work through this. I will talk to  
4 everyone on Wednesday. Thank you.

5 (Proceedings concluded at 5:07 p.m.)

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C E R T I F I C A T E

I, Shawna J. Evans, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Shawna J. Evans  
Shawna J. Evans, RMR  
Official Federal Court Reporter